No. 15047

# In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

MONROE FEED STORE, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


THEOPHIL C. KAMMHOLZ,
*General Counsel,*
MARCEL MALLET-PREVOST,
*Assistant General Counsel,*
ARNOLD ORDMAN,
FRANCIS SPERANDEO,
*Attorneys,*
*National Labor Relations Board.*

# INDEX



## AUTHORITIES CITED

Statutes:



Miscellaneous:

# In the United States Court of Appeals for the Ninth Circuit

No. 15047

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

MONROE FEED STORE, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### JURISDICTION

This case is before the Court upon a petition of the National Labor Relations Board for enforcement of its order issued against respondent on October 29, 1954, pursuant to Section 10 (c) of the National Labor Relations Act as amended, herein called the Act.[1] The Board's decision and order (R. 35-40)[2] are reported in 110 NLRB 630. This Court has jurisdiction of the case, the unfair labor practices having occurred in

[1] 61 Stat. 136, 29 U.S.C., Section 151, *et seq.* The relevant statutory provisions appear in the appendix, *infra,* pp. 14-16.

[2] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

Monroe and Corvallis, Oregon, within this judicial circuit.[3]

## STATEMENT OF THE CASE

### I. The Board's Findings of Fact and Conclusions of Law

Briefly stated, the Board found, in agreement with the Trial Examiner, that respondent violated Section 8 (a) (1) of the Act by threatening and interrogating its employees with respect to union activities and by discharging certain of its employees with the purpose of interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act; and that respondent violated Section 8 (a) (5) and (1) of the Act by failing and refusing to bargain collectively with the exclusive bargaining representative of its employees and by granting unilateral wage increases. The evidence upon which the Board based its conclusions is summarized below:

*The unfair labor practices*

1. *Interference, restraint and coercion*

Respondent operates two plants, one in Monroe, Oregon and one in Corvallis, Oregon (R. 10-11; 57). Wayne Giesy was at all times here material general

---

[3] Respondent, a corporation, operates two plants in Oregon where it buys, processes, and sells feed, grain, fertilizer and seed. At the direction of E. F. Burlingham & Sons, which owns a substantial amount of respondent's stock as well as a substantial interest in other seed and feed companies, respondent during the year preceding the Board hearing shipped at least $72,000 worth of seed directly to customers outside the State of Oregon (R. 10-11, 17; 57-58, 62-70, 191-192). On these facts alone the Board's assertion of jurisdiction was plainly proper. *Wayside Press, Inc.* v. *N.L.R.B.*, 206 F. 2d 862, 864 (C.A. 9); *Sam Zall* v. *N.L.R.B.*, 202 F. 2d 499, 500 (C.A. 9); *Jonesboro Grain Drying Cooperative,* 110 NLRB 481.

manager of both plants and a director of respondent corporation (R. 11-12; 57). David Crockett, deceased at the time of the Board hearing, was assistant manager in charge of the Corvallis operation (R. 12; 93).

On October 27, 1953, six of respondent's employees met at the home of employee Webster Sams with Austin Stevens, business agent for the American Federation of Grain Millers, Local 61, AFL, herein called the Union (R. 12; 132-133, 147). At this gathering and on the next day 12 of the 13 employees who comprise an appropriate unit covering respondent's two operations signed cards designating the Union as their collective bargaining representative (R. 12, 14; 132-134, 147, 154-155).

On October 28, 1953, the day after the meeting, Assistant Manager Crockett was informed by an unidentified person that a union meeting had been held at Sams' house (R. 12; 94-95). Crockett that afternoon questioned Sams as to the accuracy of this information and Sams admitted that a meeting was held in his house and that they "had a union in there" (R. 12; 149-150). Following this conversation or on the next day, Crockett reported the matter to General Manager Giesy (R. 12; 94-95). According to Giesy, however, Crockett reported to him that a meeting had been held but assured Giesy that the meeting did not concern a union (*ibid.*).[4] Although professedly accepting this assurance, Giesy early in the afternoon of October 30 questioned employee Kenneth Mumford as to who was at the "union meeting" (R. 12-13; 138-139). Mum-

[4] Respondent sought to buttress Giesy's testimony by proffering in evidence an affidavit (Resp. Ex. 2) executed by Crockett some time before his death. The Trial Examiner excluded the affidavit, a copy of which is included in the certified record as a rejected exhibit.

ford acknowledged that he had been at the meeting and that all of the employees present had signed authorization cards *(ibid.)*.[5]

That same afternoon, respondent's foreman, Turner told employee Frank Harrington that he had overheard a conversation between Crockett and Giesy concerning the employees' efforts "to get a union in the mill" (R. 15; 156). When Harrington asked Turner what he supposed would happen, Turner answered, "Well, Wayne [Giesy] will just find out who started it and will fire him. That's what happened the other time" (R. 15; 156). In similar vein, Turner had told employee Johnson about a month earlier that Giesy would fire everyone who joined a union (R. 15; 152-153).

At the close of business on October 30, Giesy without giving any advance notice discharged all of the employees at Monroe with the exception of his father and the bookkeeper (R. 12; 97-99). At the same time Crockett at Giesy's direction discharged all the employees at Corvallis, also without giving advance notice (R. 12; 108-110). Three days later, on November 2, as more fully discussed, *infra,* Giesy rejected a bargaining request by the Union on the ground that respondent had no employees.

That very day, however, respondent started to rehire and within a few months restored its normal working

---

[5] The findings as to this incident were based on Mumford's credited testimony. Eight months after the Board's decision and order and some fifteen months after Mumford had testified, respondent moved that the Board reopen the case on the basis of a terse affidavit by Mumford which was dated a few weeks earlier and which stated that there was "not any mention of Union" in his conversation with Giesy. The Board denied the motion for the reason that it presented inadequate ground to warrant reconsideration of its decision and order. See discussion, *infra,* pp. 7-8.

complement (R. 13-14; 80-82, 102-110). Several of the employees discharged on October 30 were not rehired, however (R. 20-21; 102-110, 164-166, 167-169). Moreover, Giesy did not discontinue his interest in the Union. On November 2, Giesy asked employee Cook whether he was a member of the Union (R. 13; 178-179), and some time thereafter in a conversation with employees Frank and Don Harrington, Giesy observed that "I'm going to have to put some of these men back to work and I'm going to lose money by it, but . . . before I go Union, I'll shoot myself right between the eyes" (R. 15-16, 21; 160, 164).

Upon the foregoing facts the Board found that respondent by interrogating its employees as to their union activities and by threatening them with the drastic consequences if they joined the Union interfered with, restrained, and coerced them in the exercise of rights guaranteed by Section 7 of the Act thereby violating Section 8 (a) (1) (R. 26). The Board found a further unlawful interference in the October 30 mass discharge immediately after respondent learned of its employees' union activities (R. 26). In this connection the Board rejected as unsupported by the record respondent's claim that the discharges were necessitated by respondent's poor financial condition (R. 18-19).

### 2. *The refusal to bargain and the unilateral wage increase*

Twelve of the thirteen employees comprising an appropriate unit having signed cards designating the Union as their bargaining representative (*supra,* p. 3), Union representatives Austin Stevens and Claude Schaeffer visited Giesy at the Monroe plant on No-

vember 2, 1954, informed him that the Union represented a majority of the employees, and asked for collective bargaining negotiations (R. 13; 87-90, 129-130, 134-135).[6] Giesy rejected the request with the curt observation that as of the night of October 30, respondent had no employees and that therefore there was "no problem" (*ibid.*).

After resuming operations, however, respondent, without consulting the Union and in the face of its claim of poor financial condition, increased the hourly pay of each of its employees by approximately 30 cents (R. 18; 105, 114, 118-119).[7]

The Board found that the Union on October 30, and at all times thereafter, represented a majority of respondent's employees in an appropriate unit (R. 14). The Board concluded that by refusing on November 2 to bargain with the Union pursuant to its request and by unilaterally granting the employees wage increases thereafter without consulting the Union, respondent violated Section 8 (a) (5) and (1) of the Act (R. 25-26).

### II. The Board's Order

Pursuant to the foregoing findings the Board ordered respondent to cease and desist from engaging in the unfair labor practices found and from interfering in any other manner with the Section 7 rights of its employees (R. 36-37). Affirmatively, the Board, in addition to ordering the posting of appropriate notices, directed respondent to reinstate, in instances where it had not already done so, the employees discharged on

---

[6] Giesy admitted that on October 31, he was told by employee Cantrell, Sr., that a majority of the employees had signed Union cards (R. 215-216).

[7] Supervisors also received substantial salary increases (R. 119),

October 30,[8] to make all the October 30 dischargees whole for earnings lost as a result of the discrimination, and to bargain collectively with the Union upon request (R. 37-38, 24-25).

ARGUMENT

**I. Substantial Evidence on the Record as a Whole Supports The Board's Finding that Respondent Violated Section 8(a)(1) of the Act By Interrogating and Threatening Its Employees Concerning Their Union Activities and By Discharging Them Because of Those Activities**

A. *The interrogation and threats*

The evidence summarized above establishes that respondent immediately upon learning of its employees' desire for union representation interrogated employees concerning their union membership and threatened to discharge them. Such conduct engaged in by Foreman Turner, Assistant Manager Crockett, and General Manager Giesy plainly constituted unlawful interference interdicted by Section 8 (a) (1) of the Act. See *N.L.R.B.* v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821 (C.A. 9).

Respondent's claim that it should not be held answerable for Turner's threats is devoid of merit because Turner's supervisory status is clearly established (R. 80) and because Turner's threats directly reflected the views of his superior, General Manager Wayne Giesy. Respondent's reliance on Mumford's belated affidavit (*supra*, p. 4, n. 5) to rebut the latter's testimony concerning his conversation with Giesy and on that ground to reopen the hearing is likewise devoid of merit. There is no showing that the information

[8] For reasons discussed, *infra*, pp. 12-13, the Board rejected respondent's claim that employee Joyner's conduct subsequent to his unlawful discharge disqualified him for reinstatement (R. 22-23).

contained in Mumford's affidavit, drawn more than a year after he had testified, was not available at the time of the hearing. Moreover, even accepting the terse affidavit at face value, the fact that the word "Union" was not mentioned in the course of the conversation would not detract from the remainder of the testimony which established that Giesy interrogated Mumford concerning the events at the employee meeting. Under these circumstances the Board's refusal to reopen the hearing to reconsider its earlier evidentiary determination was within its allowable discretion. Cf. *N.L.R.B.* v. *Osbrink,* 218 F. 2d 341, 344-345 (C.A. 9), certiorari denied, 349 U. S. 928.[9]

B. *The mass discharge*

Three days after learning of the Union's organizational campaign and the employees' favorable disposition toward the Union, respondent with no advance notice precipitately discharged virtually all of its employees in both Monroe and Corvallis. The Board found that this action was taken to frustrate the unionization of its employees and was therefore violative of Section 8 (a) (1) of the Act (R. 18-19).[10] Respondent

---

[9] Even more vulnerable is respondent's claim, advanced for the first time in its Statement of Points to this Court that the Trial Examiner erred in rejecting Crockett's affidavit (*supra*, p. 3, n. 4). Respondent's failure to urge this objection before the Board—a failure it in no way explains—precludes it from urging that objection here. Section 10(e) of the Act. *N.L.R.B.* v. *Noroian,* 193 F. 2d 172, 173 (C.A. 9). Moreover, the Trial Examiner's ruling follows settled evidentiary canons. *Wigmore on Evidence,* 3rd ed. §§ 1384, 1395. Finally, the affidavit even if accepted and credited would not invalidate the Board's unfair labor practice findings which are independently supported in the record.

[10] The complaint did not allege the discharge to be violative of Section 8 (a) (3) and the Board made no finding in that regard. On settled authority, however, "Orders of reinstatement and back

controverts this conclusion claiming that the discharges were motivated by economic considerations.

Of course, an employer may with impunity curtail his operations and discharge employees for any reason unrelated to union and other concerted activities protected by the Act. However, curtailment of operations or the discharge of employees for the purpose of interfering with legitimate union or organizational activities plainly deprives employees of rights guaranteed them by Section 7 contrary to the Section 8 (a) (1) prohibition. We submit that the Board could reasonably find, as it did, that the discharges here were of the latter variety.

First, as already shown (p. 4), the discharges took place almost immediately after respondent learned of its employees' desire for union representation and were consistent with respondent's antecedent threats of reprisal for union organization. In addition, the discharges served the purpose of destroying, in respondent's view, any basis for a Union claim for recognition. Indeed, respondent utilized the discharges as a ground for rejecting the Union's November 2 bargaining request even though on that very day it had started to restaff its plant and was rehiring a number of the employees it had released only three days earlier. Further indication that the discharges were an anti-union stratagem and were not prompted by genuine economic considerations is afforded by the fact that after resuming operations respondent put into effect hourly wage increases with the purpose, as the Board found

---

pay are as much entitled to be made for discharges constituting violations of Section 8 (a) (1) as for those violative of Section 8 (a) (3)." *N.L.R.B.* v. *J. I. Case Co.*, 198 F. 2d 919, 924 (C.A. 8), certiorari denied, 345 U.S. 917. Accord: *N.L.R.B.* v. *Reed*, 206 F. 2d 184, 189-191 (C.A. 9).

(R. 22), of further discouraging union adherence. See *N.L.R.B.* v. *Grant,* 199 F. 2d 711, 712 C.A. 9), certiorari denied, 344 U. S. 928. In sum, the discharge of the employees on October 30 was part of respondent's over-all effort to forestall union organization and collective bargaining which respondent manifestly opposed.

This conclusion is "strengthened by the fact that the explanation of the discharge offered by the respondent fails to stand under scrutiny." *N.L.R.B.* v. *Dant,* 207 F. 2d 165, 167 (C.A. 9). Contrary to respondent's claim that its economic situation prompted the precipitate discharges of October 30, the record shows that respondent had a general knowledge of its poor financial condition long before, yet at no time prior to the advent of the Union had it discharged employees (R. 111, 183-185, 187-193).[11] And, as already suggested, the grant of wage increases hardly squares with the claim that an economic pinch necessitated the earlier discharges. Respondent's true motivation in this regard is better shown, we submit, by Giesy's statement that "I'm going to have to put some of these men back to work and I'm going to lose money by it, but . . . before I go Union, I'll shoot myself right between the eyes" (*supra,* p. 5).[12]

---

[11] As already noted (p. 2, n. 3), E. F. Burlingham & Sons owns a substantial interest in respondent corporation and purchases much of its output. Burlingham's accountant, who also handles respondent's financial statements, testified that other seed and feed companies in which Burlingham had an interest operated at a loss but did not find it necessary to reduce their employee complement (R. 191-193).

[12] Although respondent's operations were on a somewhat reduced scale for some time after the October 30 discharges, this consequence, as the Board found (R. 21-22) flowed from and was part of respondent's overall "plan to defeat the employees' desires for representation." In any event, respondent may not now claim exoneration from liability for a situation brought about by its earlier unlawful conduct.

**II. Substantial Evidence On the Record as a Whole Supports the Board's Finding that Respondent Violated Section 8 (a) (5) of the Act**

The obligation of an employer to bargain collectively with a representative designated by a majority of his employees in an appropriate unit is expressly set forth in Sections 8 (a) (5) and 9 (a) of the Act. In the instant case respondent does not question the Board's finding that the unit which the Union sought to represent is appropriate. And when the Union demanded recognition on November 2, 1953, respondent did not challenge the Union's majority status which was clearly established by the record (*supra,* p. 3).[13] Giesy merely stated that as respondent had no employees, a situation brought about by its own unlawful discharges, there was "no problem." Respondent, however, already knew at this time that virtually all the employees whom it had discharged had designated the Union as their bargaining representative and under the explicit terms of Section 2 (3) of the Act, these individuals "whose work had ceased as a consequence of . . . [an] unfair labor practice" retained their status as employees for purposes of the Act. Under these circumstances, the refusal to bargain was violative of the Act and respondent's continued efforts to undermine the Union only aggravated that violation. *N.L.R.B.* v. *Trimfit, supra; N.L.R.B.* v. *Parma Water Lifter Company,* 211 F. 2d 258 (C.A. 9), certiorari denied, 348 U. S.

---

[13] Respondent first challenged the Union's majority status and requested a consent election on February 10, 1954, after the complaint had issued in the instant proceeding and after respondent had engaged in the unfair labor practices herein set forth. This Court has held that by such conduct, so timed, an employer may not relieve itself of its obligation to bargain. *N.L.R.B.* v. *Trimfit of California, Inc.,* 211 F. 2d 206, 210.

829; *N.L.R.B.* v. *Geigy Company, Inc.,* 211 F. 2d 553, 556 (C.A. 9), certiorari denied 348 U. S. 821.

Apart from the foregoing, respondent independently violated Section 8 (a) (5) of the Act by granting general wage increases to the employees in the appropriate unit without consulting the Union. As part of his obligation to bargain an employer must notify the collective bargaining representative of its employees of any contemplated changes in the terms and conditions of employment in order to give that representative an opportunity to bargain with respect to such changes. *N.L.R.B.* v. *Crompton Highland Mills,* 337 U.S. 217, 225; *May Dept. Store Co.* v. *N.L.R.B.,* 326 U.S. 376, 384; *N.L.R.B.* v. *Parma, supra.*

### III. The Board's Order Is Valid and Proper

The Board's order embodies the customary provisions appropriate to remedy violations such as those here found. Respondent, however, challenges the propriety of that order insofar as it directs reinstatement and back pay for employee Joyner. In respondent's view Joyner disqualified himself for such remedy by reason of certain misconduct in which he engaged after his discharge.

Joyner was a 17-year-old high school student who prior to his unlawful discharge on October 30, 1953 had worked regularly for respondent on a part-time basis (R. 18; 168-169). In December 1953 Joyner requested Giesy to reemploy him. Giesy refused to reemploy Joyner, the latter was aggrieved at the refusal, and the conversation became heated (R. 169, 213-214). At one point Joyner invited Giesy "outside" for a fight, but Giesy declined on the ground that he would not fight a 17 year old boy "under any consideration" (*ibid.*).

The Trial Examiner, whose findings the Board adopted, concluded that while Joyner's conduct was not to be condoned, "this unpleasant occurrence took place in a setting where Joyner justifiably believed that he was being discriminatorily deprived of his job" (R. 22-23). In the Board's view *(ibid.)* the fact that Joyner, a high school boy, did not have a sense of restraint equal to the stress laid upon it at this time ought not to disqualify him from the remedy of reinstatement and back pay which on the basis of respondent's earlier and unprovoked treatment of Joyner was plainly appropriate.

Particularly because of Joyner's youth, it may be observed here as it was in *N.L.R.B.* v. *Efco Mfg. Co.*, 227 F. 2d 675, 676 (C.A. 1), certiorari denied, 350 U.S. 1007 where an analogous contention was advanced and rejected, "we have no such case as where an employee puts his employer in direct fear of an imminent beating. We have only a display of insolence . . ." In the context of this case, as in *Efco,* no adequate ground is shown for withholding the remedial provisions of the Act.

## CONCLUSION

Accordingly, it is respectfully submitted that the Board's order should be enforced in full.

THEOPHIL C. KAMMHOLZ,
*General Counsel,*
MARCEL MALLET-PREVOST,
*Assistant General Counsel,*
ARNOLD ORDMAN,
FRANCIS SPERANDEO,
*Attorneys,*
*National Labor Relations Board.*

JULY, 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 301, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3).

UNFAIR LABOR PRACTICES

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the

purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the Court shall cause notice theerof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 389191 1631